

FEDERAL CIRCUIT COURT OF AUSTRALIA

DANG v MINISTER FOR IMMIGRATION & ANOR

[2018] FCCA 268

Catchwords:

MIGRATION – *Migration Act 1958* (Cth) – application for judicial review of decision of Administrative Appeals Tribunal which affirmed a decision of the Delegate of the Minister for Immigration refusing to grant the Partner visa applicant a Subclass 309 Partner visa – no jurisdictional error – application for judicial review dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359A, 359AA, 424A
Migration Regulations 1994 (Cth)

Cases cited:

Minister for Immigration and Citizenship v SZFLX (2009) 238 CLR 507
Minister for Immigration and Border Protection v SZTJF [2015] FCA 1052
NBKT v Minister for Immigration and Multicultural Affairs [2006] 156 FCR 419
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609
SZMCD v Minister for Immigration (2009) 174 FCR 415
SZTNL v Minister for Immigration and Border Protection [2015] FCA 463
SZTGV v Minister for Immigration (2015) 229 FCR 90

Applicant:

SON THANH DANG

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 698 of 2016

Judgment of:

Judge Dowdy

Hearing date:

9 March 2017

Delivered at:

Sydney

Delivered on:

13 February 2018

REPRESENTATION

Counsel for the Applicant: Mr L Karp of Counsel

Solicitors for the Applicant: Vietaust Lawyers

Counsel for the Respondents: Mr T Reilly of Counsel

Solicitors for the Respondents: Mills Oakley

THE ORDERS OF THE COURT ARE AS FOLLOWS:

- (1) The Amended Application filed in this Court on 24 February 2017 is dismissed.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 698 of 2016

SON THANH DANG

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The Applicant is a male aged 55 years, having been born on 23 February 1962 in Cambodia, although of Vietnamese extraction. He appears to have been granted Australian citizenship on 19 June 1987.
2. On 10 February 2014 he sponsored his wife Ms Le Thi Lan (**Partner visa applicant**) to migrate to Australia. They had married in Vietnam on 2 January 2014. Both had previously been married and divorced with children, and the Partner visa applicant intended to migrate to Australia with her two children.

3. The Partner visa applicant is a Vietnamese citizen aged 43 years, having been born on 14 December 1974 in Vietnam. She applied for a Partner (Provisional) (Class UF) (Subclass 309) visa (**Partner visa**) on 14 March 2014 in Vietnam on the grounds of her being in a spousal relationship with the Applicant. Her children were included in her Partner visa application as secondary applicants.
4. By Application filed in this Court on 24 March 2016 the Applicant as sponsor sought to quash and have redetermined the decision of the Second Respondent, the Administrative Appeals Tribunal (**the Tribunal**) dated 24 February 2016, which affirmed the decision of the Delegate (**Delegate**) of the Respondent, the Minister for Immigration and Border Protection (**Minister**) dated 16 October 2014, refusing to grant Partner visas to the Partner visa applicant and her children.
5. The Applicant then on 24 February 2017 filed an Amended Application seeking effectively the same relief.

Relevant Background

6. The claim in this Court as argued by Mr Karp of Counsel, who appeared for the Applicant, is put on a relatively confined and specific legal basis and hence the background facts may be stated succinctly.
7. The Applicant and the Partner visa applicant first met each other in July 2012 in a coffee shop in Vietnam. They met one more time before the Applicant returned to Australia on 5 August 2012. After his return to Australia he contacted the Partner visa applicant and then returned to Vietnam on 11 May 2013. He met her and her family and returned to Australia on 25 May 2013. In September 2013 they agreed to marry. The Applicant travelled to Vietnam on 17 December 2013, their wedding ceremony took place on 2 January 2014 and their marriage certificate was signed on 10 January 2014. The wedding ceremony was held at the home of the Partner visa applicant's sister and there was then a subsequent party / wedding reception at the home of the mother of the Partner visa applicant.
8. The Applicant returned to Australia on 18 January 2014, with the Partner visa application being lodged at the Australian Consulate-General in Ho Chi Minh City on 14 March 2014.

Decision of the Delegate

9. By her Decision Record of 16 October 2014 the Delegate in Ho Chi Minh City refused to grant a Partner visa to the Partner visa applicant as primary applicant and to her children as secondary applicants.
10. The Delegate was not satisfied that the Applicant and the Partner visa applicant presented themselves to family and friends as being in a committed spousal relationship, or were regarded by others as being in such a relationship. The Delegate considered that the Partner visa applicant at interview demonstrated a limited knowledge of the Applicant. She did not have any knowledge of the visit from Australia to Vietnam of the Applicant's three sons in July 2013. The Delegate was not satisfied that the Applicant and the Partner visa applicant were in a genuine and continuing relationship and found that the Partner visa applicant was not the spouse of the Applicant, as defined by s.5F of the *Migration Act 1958* (Cth) (**the Act**) and she refused to grant the Partner visas as sought.

Decision of the Tribunal

11. The Applicant applied to the Tribunal on 27 October 2014 for merits review of the decision of the Delegate.
12. The Applicant appeared at a hearing before the Tribunal on 17 February 2016 to give evidence and present arguments, together with his registered migration agent. The Partner visa applicant gave oral evidence at the hearing via telephone from Vietnam.
13. At [11] of its Decision Record the Tribunal accepted that the Applicant and the Partner visa applicant had been validly married in Vietnam on 10 January 2014. The Tribunal then proceeded to review and consider whether they satisfied the further requirements of s.5F of the Act and reg.1.15A of the *Migration Regulations 1994* (Cth).
14. In the result the Tribunal did not find either the Applicant or the Partner visa applicant to be credible witnesses. The Tribunal's ultimate conclusion was expressed in [40] – [41] of its Decision Record as follows:

[40] The Tribunal did not find the applicants to be credible witnesses. Taking into account the limited knowledge the applicants have of each other and their children and the absence of any preparation for the children's lives in Australia, the Tribunal is not satisfied that the applicants have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship between them is genuine and continuing or that they live together or do not live separately and apart on a permanent basis.

[41] Given these findings the Tribunal is not satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.

15. Accordingly, the Tribunal affirmed the decision of the Delegate not to grant Partner visas to the Partner visa applicant and her children.
16. I note here as being relevant to the Grounds of the Amended Application, considered below, that as part of its reasoning process the Tribunal recorded in its Decision Record its consideration of apparent inconsistencies or lack of knowledge exhibited in the respective evidence of the Applicant and the Partner visa applicant as given at the Tribunal hearing.
17. At [28] – [29] of its Decision Record the Tribunal contrasted evidence given by the Applicant and the Partner visa applicant in relation to two of the three sons of the Applicant, namely Michael and Peter, who lived in Australia with their mother, the previous wife of the Applicant.
18. At [28] the Tribunal recorded that the Applicant had said that:
 - a) his sons Michael and Peter played football;
 - b) Peter had recently gone to Canberra to play football;
 - c) Michael had studied plumbing for two years at TAFE; and
 - d) both Michael and Peter had been working for some months, but neither boy was presently working.
19. At [29] the Tribunal recorded that the Partner visa applicant had given the following evidence:

- a) she thought Michael had finished high school and was looking for work;
 - b) she thought that Peter was “*also waiting to learn a trade*”;
 - c) neither Michael or Peter “*had ever been working*”; and
 - d) she did not know if either Michael or Peter “*played any sport*”.
20. Then at [32] of its Decision Record the Tribunal recorded that the Applicant had told it that there were about 70 people at the wedding held at the Partner visa applicant’s sister’s house on 10 January 2014 in Vietnam. However, the Partner visa applicant had told the Delegate at interview that there were 30 people at the wedding. At the hearing before the Tribunal the Partner visa applicant said there were 30, or possibly 40 people at the wedding. The Applicant reiterated that there were about 70 people at the wedding.
21. At [35] the Tribunal recorded that the Applicant had said that about 50 people attended the wedding party / reception at the house of the mother of the Partner visa applicant. This was contrasted with the evidence of the Partner visa applicant at the interview with the Delegate, where she said there had been 10 to 20 people attending the wedding reception. The Applicant maintained that the estimate of the Partner visa applicant was not correct, and that there were 50 people in attendance.

Grounds of Application

22. The Grounds of the Amended Application were refined by Mr Karp at the hearing to be as follows:

- 1. *The second respondent (the Tribunal), acted in breach of s.359A (read with s.359AA of the Migration Act).*

Particulars

- (a) *Failure to give to the applicant, clear particulars of information that the Tribunal considered would be part of the reason for affirming the decision under review, that being information by which the Tribunal concluded that the visa applicant's account of what the applicant's children did was different to his.*

2. *The Tribunal acted in breach of s.359A in that it failed to comply with s.359AA(1)(b)(iii).*

Particulars

- (a) *Failure to advise the applicant that he may seek additional time to respond to the following information:*

~~(i) That department records showed that the applicant's sons were outside for two weeks rather than the three or four weeks that he claimed.~~

(ii) *That the visa applicant claimed that there were 30, or 30 to 40 guests at their wedding whilst the applicant said that there were about 70.*

(iii) *The visa applicant had said that there were ten to twenty people at the wedding party, whereas the applicant's evidence was that there were fifty people present.*

Consideration

Ground 1

23. This Ground claims, and Mr Karp submitted, that the Tribunal failed to comply with its obligation under s.359A(1) of the Act to give to the Applicant “*clear particulars of any information that the Tribunal considers would be the reason, or part of the reason... for affirming the decision*” of the Delegate under review in connection with the sporting and work activities of Michael and Peter summarised in [18] – [19] above.

24. The first thing that can be said is that the information and evidence recorded at [18] above was information that the Applicant “gave” at the hearing before the Tribunal in response to questioning by the Tribunal. Therefore, s.359A(4)(b) of the Act rendered inapplicable the obligation of the Tribunal under s.359A(1) to give clear particulars of such information to the Applicant: see *NBKT v Minister for Immigration and Multicultural Affairs* [2006] 156 FCR 419 at 434 - 435 [57] – [59] per Young J with the agreement of Gyles and Stone JJ in connection with the analogue provision, being s.424A of the Act.

25. Second, insofar as the material summarised at [18] – [19] might impact upon the Partner visa applicant’s claim to be the spouse of the Applicant, such material did not constitute “*information*” for the purposes of s.359A(1) of the Act because none of it in terms contained a “*rejection, denial or undermining*” of the Partner visa applicant’s claims to a Partner visa, as required by *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 (**SZBYR**) at [17] and *Minister for Immigration and Citizenship v SZFLX* (2009) 238 CLR 507 at [22]. Nothing in the material summarised in [18] – [19] in terms denies that the Partner visa applicant was in a spousal relationship with the Applicant. As was said in *SZBYR* at 616 [18]:

“However broadly “information” be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence.”

26. In this respect [31] – [32] of the judgment of Yates J in *Minister for Immigration and Border Protection v SZTJF* [2015] FCA 1052 are apposite.

[31] There are two matters to note concerning the information referred to in [21] of the decision record. First, it is not information which contains a rejection, denial or undermining of the first respondent’s claims to protection as summarised in [7] above. Put another way, the information was not of “dispositive relevance” to the Convention claims advanced by the first respondent: MZXBQ v Minister for Immigration and Citizenship [2008] FCA 319; (2008) 166 FCR 483 at [27]-[29]; SZMDS v Minister for Immigration and Citizenship [2009] FCA 210; (2009) 107 ALD 361 at [14]. It was simply information about the first respondent’s travel arrangements and travel to Australia and her living arrangements in Australia. Secondly, as the Minister submits, the information itself is “mere inconsistency” or “evidence that [came to be] relied upon to find inconsistency”. I reject the first respondent’s submissions to the contrary.

[32] I accept, therefore, the Minister’s submission that the information referred to in [21] of the decision record is not information to which s.424A(1)(a) refers. It follows that the Tribunal was not obliged to give this information to the first respondent under s.424A(1)(a). Its resort to s.424AA for that

purpose was mistaken. Further, the first respondent's application for judicial review before the Federal Circuit Court proceeded on the mistaken basis that s.424A(1)(a) required the Tribunal to give the information to her. The primary judge's finding that the Tribunal's discretion under s.424AA(b)(iv) miscarried and resulted in breach of s.424A(1) and, hence, in jurisdictional error, cannot be sustained.

27. To similar effect Griffiths J said in *SZTNL v Minister for Immigration and Border Protection* [2015] FCA 463 at [52] – [53] as follows:

*[52] Neither of the two relevant pieces of information constituted "information" for the purposes of s 424A(1). Neither Mr X's letter nor the appellant's evidence in relation to it given to the delegate comprised a rejection, denial or undermining of the appellant's claim to be a person to whom Australia owed protection obligations. The relevant information was not, of itself, of "dispositive relevance" to the appellant's claims for protection, nor did that information, by itself, undermine his claims. Rather, the information, when viewed against other statements made by the appellant, cast doubt on the appellant's credibility. I accept the Minister's submission that information merely going to credibility does not fall within s 424A. As Heerey J observed in *MZXBQ v Minister for Immigration and Citizenship* [2008] FCA 319; (2008) 166 FCR 483 at [29]:*

It can also be noted that the section speaks of information that "would" be the reason etc, not "could" or "might". This is another indication that information merely going to credibility is not within the section. An applicant may be disbelieved on some issues, but believed on others, or the application may be determined one way or the other by issues unrelated to credibility. Lack of credibility in itself does not necessarily involve rejection, denial or undermining of an applicant's claims.

[53] The relevant two pieces of information became material only because the Tribunal relied upon them in finding inconsistencies in the appellant's evidence, which lead to the conclusion that he was not a truthful witness. I accept the Minister's submission that it was these inconsistencies (or the process of comparison between the appellant's evidence and the factual statements with which the evidence was

compared) that counted against him, however, neither inconsistency nor such a comparative process constitutes “information” for the purposes of s 424A(1) (see SZBYR at [18] and SZJBD v Minister for Immigration and Citizenship [2009] FCAFC 106; (2009) 179 FCR 109 at [104] per Buchanan J, with whom Perram J agreed).

28. In my view Ground 1 fails to establish jurisdictional error.

Ground 2

29. In my view this Ground also fails. It is founded on the submission that the Tribunal failed under s.359AA(1)(b)(iii) of the Act to advise the Applicant (and I treat the submission here as being also made in connection with the Partner visa applicant) that he might seek additional time to comment on the evidence and information summarised in [20] – [21] above concerning the number of people at the wedding and wedding reception.
30. I first note that the Tribunal’s non-compliance with s.359AA of the Act does not in itself constitute jurisdictional error: *SZMCD v Minister for Immigration* (2009) 174 FCR 415 per Moore, Tracey and Foster JJ and *SZTGV v Minister for Immigration* (2015) 229 FCR 90 (***SZTGV***) per Perram, Jagot and Griffiths JJ.
31. Second, s.359AA of the Act is only engaged and becomes operative if the Tribunal in the first instance is required to comply with s.359A in connection with the relevant material. In this case, for the reasons given above as to why s.359A(1) did not apply to the evidence and information concerning the Applicant’s son’s visits to Vietnam, s.359AA also did not apply to the evidence and information concerning the number of people at the wedding and wedding reception. It follows that s.359AA was immaterial and the Tribunal did not have to comply with s.359AA in order to be exempt from the requirements of s.359A(1): see generally *SZTGV* at 108 – 109 [50] – [57].
32. I finally note that Mr Karp accepted at the hearing that the Tribunal’s apparent belief that either or both of s.359A and s.359AA applied to the information summarised in [18] – [21] above is immaterial if in fact the information was exempted from the operation from those provisions: see *SZTGV* at 109 [53].

33. Accordingly, in my view this Ground also fails to establish jurisdictional error.

Disposition

34. Mr Karp as Counsel for the Applicant put everything that could be reasonably submitted in attempting to establish jurisdictional error, but in the result the Amended Application to this Court fails to establish jurisdictional error and must be dismissed.

I certify that the preceding thirty-four (34) paragraphs are a true copy of the reasons for judgment of Judge Dowdy

Associate:

Date: 13 February 2018